UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

In re:

ROY LOWE,

Debtor.
_____/

Case No.: 18-30651-KKS
Chapter: 7

ORDER DENYING DEBTOR'S *NOTICE OF MOTION AND MOTION FOR STAY PENDING RECONSIDERATION FOR ORDER DENYING DEBTOR'S MOTION FOR SANCTIONS* (DOC. 39)

THIS MATTER came before the Court for hearing on September 26, 2018, on the self-represented Debtor's *Notice of Motion and Motion for Stay Pending Reconsideration for Order Denying Debtor's Motion for Sanctions* (the "Reconsideration Motion," Doc. 39). Debtor requests the Court to reconsider its *Order Denying Debtor's Motion for Sanctions*[1] for two main reasons: 1) Pen Air Federal Credit Union ("Pen Air") improperly repossessed his 2010 GMC Acadia ("Vehicle"); and 2) Pen Air's refusal to turn the Vehicle over post-petition violated the automatic stay.[2] Pen Air did not file a response to the Reconsideration

[1] Doc. 28.
[2] Debtor also improperly combines a separate request for relief in the Reconsideration Motion (a request for a stay of the Court's prior ruling), but the Court has elected not to strike the Reconsideration Motion as a violation of N.D. Fla. LBR 7007-1 B.

Motion. Having heard argument of Debtor and counsel for Pen Air at the hearing, and having reviewed applicable case law, the Court confirms in this Order its oral ruling at the hearing that the Reconsideration Motion should be, and is, denied.

Debtor had two loans with Pen Air. The loan at issue here was represented by a "Loanliner Credit and Security Agreement" ("Security Agreement"), pursuant to which Debtor financed the purchase of the Vehicle. It is undisputed that Debtor defaulted on the payments due under the Security Agreement and on July 10, 2018, Pen Air repossessed the vehicle. On July 12, 2018, Debtor filed his Chapter 7 petition for relief commencing this case. After filing the petition, Debtor demanded that Pen Air return possession of the Vehicle. Pen Air declined.

Debtor filed his Sanctions Motion on July 19, 2018 (Doc. 15). Pen Air filed a response to the Sanctions Motion and the Court held a hearing on that motion on July 25, 2018 (Docs. 21 & 24). The Court continued the hearing and gave the parties additional time to submit briefs. After reviewing additional filings by the parties, the Court denied the Sanctions Motion by order dated August 28, 2018 (Doc. 28).

Debtor filed the Reconsideration Motion on September 10, 2018 (Doc. 39).

DISCUSSION

MOTION FOR RECONSIDERATION STANDARD

The Reconsideration Motion does not set forth a specific provision of the Bankruptcy Code or Rules. Essentially, Debtor is seeking a reversal of the Court's denial of his Sanctions Motion, so his Reconsideration Motion is governed by Rule 59(e).[3]

The Eleventh Circuit has held that the only grounds for granting a motion for reconsideration under Rule 59(e) are newly-discovered evidence or manifest errors of law or fact.[4] A Rule 59(e) motion cannot be used "to relitigate old matters, raise argument or present evidence that could have been raised prior to the entry of judgment."[5]

WAIVER AND COURSE OF CONDUCT

Debtor first argues that there is a genuine issue of material fact as to whether he was in default at the time Pen Air repossessed the Vehicle. He claims that he relied on Pen Air's eight-year history of

[3] Rule 9023, Fed. R. Bankr. P., incorporates by reference Rule 59, Fed. R. Civ. P. "A motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment." Fed. R. Civ. P. 59(e).
[4] *See Arthur v. King*, 500 F.3d 1335, 1343 (11th Cir. 2007).
[5] *Michael Linet, Inc. v. Village of Wellington, Fla.*, 408 F.3d 757, 763 (11th Cir. 2005).

accepting late payments and that Pen Air waived its right to declare him in default. This issue was not before the Court on the Sanctions Motion and is not properly before the Court currently. Debtor's assertion that this Court disregarded or disallowed any claim he may have against Pen Air for violation of the Security Agreement[6] is not true. As this Court held in its original ruling on the Sanctions Motion, whether Pen Air was within its rights to declare Debtor in default and repossess the Vehicle is a matter for another day and may give rise to an affirmative claim against Pen Air by Debtor or his Chapter 7 Trustee.[7]

The only issue before this Court is, and was, whether Pen Air was legally required to return the Vehicle to Debtor after it repossessed the Vehicle pre-petition. The sub-issue, and issue determinative to the

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[6] *See,* Doc. 39, p. 4.

[7] The Affidavit and documents filed by Pen Air appear to diffuse Debtor's claim that Pen Air waived its right to accelerate or wrongfully accelerated the loan represented by the Security Agreement. Pen Air attached a copy of the Security Agreement to its *Response to Debtor's Motion for Sanctions for Violation of Automatic Stay* ("Response," Doc. 21). That document provides, in pertinent part: "We [Pen Air] can delay enforcing any of our rights under the Plan any number of times without losing the ability to exercise our rights later." (Doc. 21-1, ¶ 24.) The Affidavit attached to Pen Air's response and undisputed by Debtor reflects that Pen Air attempted to work with Debtor in March 2018 regarding the delinquent payments, but the parties were unable to reach a resolution. (Doc. 21-2, ¶ 3(g)). On April 13, 2018, Pen Air sent a letter accelerating the loan. (Doc. 25, p. 29). On May 4, 2018, Pen Air offered Debtor an opportunity to redeem the Vehicle by making one lump sum payment which would result in a reduced monthly payment, and that Debtor had previously stated he could afford. (Doc. 21-2, ¶ 3(h)).

Court's denial of the Sanctions Motion, is whether the Vehicle constitutes property of the estate pursuant to 11 U.S.C. § 541.

VIOLATION OF THE AUTOMATIC STAY

Debtor next argues that Pen Air sent letters designed to collect the debt in violation of the automatic stay. But Debtor bases this argument on letters that Pen Air sent pre-petition. Acts taken pre-petition cannot be a violation of the automatic stay, which does not come into effect until a debtor files a petition for relief.[8] The first letter Debtor complains of was dated June 28, 2018; the mailing envelope was post-marked on June 29, 2018.[9] The second "letter" was Pen Air's "Notice of Plan to Sell Property," which informed Debtor of the scheduled sale date of the Vehicle, and of his opportunity to redeem the Vehicle before the sale by tendering the full amount due, plus expenses.[10] While this notice is not dated, Debtor filed a copy of the mailing envelope showing that the notice was post-marked on July 10, 2018, two days before Debtor filed his Petition.[11]

[8] 11 U.S.C. § 362(a)(2018).
[9] Doc. 25, pp. 35-36. By the time Pen Air sent this letter Debtor was 151 days delinquent on the loan secured by the Vehicle. Doc. 21-2, page 2.
[10] Doc. 25, p. 42.
[11] Doc. 25, p. 41.

Debtor also repeats the primary argument contained in his initial Sanctions Motion: that Pen Air has continued violating the automatic stay by refusing to return the Vehicle and that he is entitled to return of the Vehicle based on the U.S. Supreme Court's ruling in *U.S. v. Whiting Pools, Inc.*[12]

As this Court explained at the hearing on the Sanctions Motion and in its written ruling, *Whiting Pools* does not apply in this case. *Whiting Pools* involved an asset that was repossessed pre-petition but was property of the debtor's bankruptcy estate.[13] The Eleventh Circuit Court of Appeals has held in *In re Kalter* that title to a vehicle transfers to the secured creditor upon repossession in Florida, so the vehicle is not property of the estate under Florida law.[14] For that reason, while *Whiting Pools* remains the law of the land regarding other types of assets, including in Florida, it does not apply to vehicles repossessed before bankruptcy in Florida.

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[12] *U.S. v. Whiting Pools, Inc.*, 462 U.S. 198 (1983).
[13] 11 U.S.C. § 541 (2018).
[14] *In re Kalter*, 292 F.3d 1350, 1354-58 (11th Cir. 2002) (citing Fla. Stat. § 319.28(2)(b):"In case of repossession of a motor vehicle . . . pursuant to the terms of a security agreement . . . an affidavit by the party to whom possession has passed stating that the vehicle . . . was repossessed upon default in the terms of the security agreement . . . shall be considered satisfactory proof of ownership.")

In re Kalter involved the same question Debtor raised in his Sanctions Motion and raises anew here: whether a debtor in Florida can compel a secured creditor to turn over a vehicle repossessed before the debtor filed the bankruptcy petition.[15] The Eleventh Circuit held that the answer to that question is no.[16] Because Pen Air repossessed Debtor's Vehicle pre-petition, under Florida law that Vehicle was not property of the estate when Debtor filed this case.[17]

Once Pen Air repossessed the Vehicle two days before Debtor filed this bankruptcy case, Debtor's only remaining right under Florida law was to redeem that Vehicle.[18] The debtors in *Kalter* argued that the right to redeem a vehicle repossessed under Florida law rendered the repossessed vehicle property of the estate.[19] The Eleventh Circuit disagreed.[20]

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[15] *Id.*
[16] *Id.* at 1352.
[17] 11 U.S.C. § 541(a)(1)(2018): "The commencement of a case . . . creates an estate. Such estate is comprised of all of the following property, wherever located and by whomever held: (1) . . . all legal or equitable interests of the debtor in property as of the commencement of the case." *In re Kalter*, 292 F.3d at 1359.
[18] Under Florida law, a debtor may redeem collateral if the debtor tenders "(a) Fulfillment of all obligations secured by the collateral; and (b) The reasonable expenses and attorney's fees described in s. 679.615(1)(a)." Fla. Stat. § 679.623(2)(2018).
[19] *In re Kalter,* 292 F.3d at 1355.
[20] *Id.*

Pen Air provided Debtor opportunities to cure the default prior to repossessing the Vehicle.[21] Debtor did not cure the default. The "Notice of Plan to Sell Property" informed Debtor of his opportunity to redeem the Vehicle after repossession under Florida law.[22] Debtor did not take advantage of the opportunity to redeem the Vehicle.[23] The record shows that Debtor would not have been able to do so: Debtor listed $20.00 cash on hand and a total of $58.00 on deposit when he filed bankruptcy; he represented that he had no employment income; due to Debtor's lack of income and assets the Court approved his application for waiver of the Chapter 7 filing fee.[24] Rather than redeem the

[21] When Debtor and Pen Air failed to reach an agreement, Pen Air notified Debtor by certified letter dated June 28, 2018 of its acceleration of the loan. (Doc. 25, p. 36). Debtor claims to have received this letter on July 14, 2018. (A copy of the letter, and certified, mailed envelope, was included by Debtor in his Reply. Doc. 25, p. 35).

[22] On July 10, 2018, after Pen Air repossessed the Vehicle, it mailed a document entitled "Notice of Plan to Sell Property," informing Debtor that the Vehicle would be sold on July 25, 2018, and that he could get the property back at any time prior to the sale by tendering the full amount due, plus expenses. (Doc. 25, p. 42).

[23] As the Eleventh Circuit pointed out, "[a]t any time before the secured party has disposed of or entered into a contract to dispose of the collateral under F.S. § 679.504 or before the obligation has been discharged under F.S. § 679.505(2), the debtor may redeem the collateral. *See* Fla. Stat. § 679.506. To do so, the debtor must tender fulfillment of all obligations secured by the collateral as well as the expenses incurred by the secured party in preparing for the disposition of the collateral." *In re Kalter,* 292 F.3d at 1354.

[24] Docs. 5, 14, p. 7 & 19.

Vehicle, Debtor repeatedly attempted to renegotiate more favorable repayment terms.[25]

The remaining issue addressed in *Kalter* is whether Debtor took steps to exercise his right to redeem the Vehicle pre- or post-petition. He did not. Like the debtors in *Kalter,* Debtor made no tender to Pen Air of all amounts due, as required under Florida law.[26] That being the case, Pen Air's continued possession of and refusal to return the Vehicle post-petition was not a violation of the automatic stay.

CONCLUSION

The Motion does not raise any newly-discovered evidence or manifest errors of law or fact. For the reasons stated here and on the record at the hearing, it is

ORDERED:

The *Notice of Motion and Motion for Stay Pending Reconsideration for Order Denying Debtor's Motion for Sanctions* (Doc.

[25] *See, e.g.,* Doc. 15; ("Throughout the course of more than a year, the Debtor consistently and clearly declared financial hardship and sought a reduced payment remedy with each and every representative of [Pen Air] he made contact with.") Doc. 25, p.3.

[26] The debtors in *Kalter* filed a Chapter 13 plan that proposed to pay the vehicle lender sixty-two cents on the dollar in return for continued use of the vehicle. The Eleventh Circuit found this insufficient to redeem. *In re Kalter,* 292 F.3d at 1355 ("In the instant cases, the Debtors likewise have taken no steps to exercise their rights to redeem.")

39) is DENIED. To the extent not specifically addressed in this Order, the remainder of Debtor's arguments, if any, are OVERRULED.

DONE and ORDERED on December 10, 2018.

KAREN K. SPECIE
Chief U.S. Bankruptcy Judge

cc: all parties in interest

Attorney J. Blair Boyd is directed to serve a copy of this Order on interested parties and file a proof of services within three (3) days of this Order.